IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL NO.59 OF 2007
IN
MISC.PETITION NO.10 OF 2006
IN
TESTAMENTARY PETITION NO.489 OF 2004

Subir Nidhir Datta. ...Appellant.
Vs.
Samir Nidhir Datta & Anr. ...Respondents.
....
Shri J.P. Shah i/b. M/s. JPS Legal for the appellant.
.....
CORAM : R. M. S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ.

February 21, 2007.

P.C.

This appeal arises from the order dated 22nd September 2006 passed in Misc.Petition No.10 of 2006. By the impugned order, the petition filed by the Appellant for revocation of the probate of the Will of deceased Nidhir Kalimohan Datta who expired on 26th December 2002, has been dismissed. The challenge to the impugned order is three fold. Firstly, that in the probate proceedings no citations were served upon the Petitioner, secondly, it being a contentious proceeding, the probate could not

have been granted by the Prothonotary & Senior Master and thirdly, that there is no provision for taking out Chamber Summons for removal of the caveat.

2. As regards the first ground of challenge, the attention is sought to be drawn to Rule 397 of the High Court Original Side Rules and in particular, sub-rule (4) thereof which provides that “no grant of probate, letters of administration or succession certificate shall be made until after the expiry of fourteen clear days from the date of the service of the citation or notice, and from the publication thereof in newspapers, if any, and from the affixing thereof on the court house and in the Collector's Office as the case may be, unless the Judge in Chambers otherwise directs.” The records undoubtedly disclose that no citations were served upon the appellant. However, records also disclose and it is undisputable that the appellant appeared in the probate proceedings and also filed a caveat. At the same time, the record also discloses that the caveat was neither accompanied by, nor thereafter the appellant had filed, any affidavit in support of the caveat disclosing the

grounds of objection for the grant of probate in respect of the Will in question. The learned Advocate for the appellant has also drawn our attention to Section 283(1)(c) of the Indian Succession Act, 1925, while contending that the question of filing affidavit will arise only after the issuance of citations. The contention is totally devoid of substance. Once it is clear that the person has chosen to file a caveat, it was not necessary for the probate Court to issue and serve citations upon the appellant and it was entirely for the appellant to file necessary affidavit disclosing the ground of objection for the grant of probate. The whole purpose of issuance of citations is to make the interested persons aware of the proceedings having been initiated for issuance of probate in relation to the Will. Once it is not in dispute that the appellant was fully aware of institution of such proceedings and he volunteered to file the caveat therein, there was no occasion for the probate Court to issue and serve the citations upon the appellant. Even otherwise, since the appellant has voluntarily chosen to file a caveat, he would be deemed to have waived the service of citations which otherwise would be required to be issued by the

probate Court.

3. As regards the second ground of challenge, undoubtedly, the moment a caveat is filed, the proceedings are transferred as contentious proceedings. However, at the same time the party objecting to the grant of probate has to disclose the ground of objection for such grant of probate. It is not merely the objection for the sake of objection that would require the probate Court to deal with the issue regarding validity of Will. In order to object to the validity of the Will, the party disputing the validity has to disclose the ground on which the validity is disputed. Obviously, therefore, factual matrix in support of the ground of objection has to be disclosed in the affidavit in support of the caveat. In the absence of such a disclosure of necessary ground for objection to the grant of probate, the Court is not powerless to revoke the caveat. Rule 402 of the Original Side Rules clearly provides that an affidavit in support of a caveat shall be filed within eight days from the date of the filing of the caveat, notwithstanding the Court vacations. Such affidavit shall state the right and interest

of the caveator, and the grounds of the objections to the application. A copy of the said affidavit shall be served by the caveator on the petitioner or his advocate on record. If such an affidavit be not filed within the prescribed time, the caveat shall not prevent the grant of probate or letters of administration. No such affidavit shall be filed after the expiry of the said eight days without an order of the Judge in Chambers. Obviously, therefore, the said rule discloses about the procedure to be followed in relation to the affidavit which is required to be filed in support of the caveat and further consequence of failure of filing of such affidavit. It is apparent from the said rule that upon a failure to file such an affidavit disclosing necessary ground to object the grant of probate, the objector would not be entitled to file such an affidavit after the expiry of the period prescribed for filing such affidavit. Consequently, the proceeding will have to cease to be a contentious proceeding. Obviously, this has to be pursuant to the order passed by the Court and an order in that regard, would be in the proceeding of Chamber Summons. The Respondent having followed the said procedure, no fault can be found in respect

thereof.

4. As regards the third ground of challenge, it cannot be disputed that in contentious proceedings, no probate can be granted by the Prothonotary & Senior Master. However, once the proceedings ceased to be contentious, nothing prevents the District Delegate in terms of Section 286 of the said Act and for the same relief the Prothonotary & Senior Master to grant probate and that is what has been done in the present case. It is not in dispute that the probate was granted after the Chamber Summons taken out by the Respondent for revocation of caveat was allowed. Obviously, at the time when the probate was grated, proceedings were not contentious proceedings.

5. The appellant has sought to draw our attention to the decision of the Himachal Pradesh High Court in **Atma ram vs. Janki**, reported in 1998 AIR (HP) 14. That was a case wherein the probate proceedings were contested by the interested persons by filing Written Statement and giving evidence to oppose the grant of

probate. In those facts, the District Delegate was not empowered to issue directions in terms of Section 286. That is not the case in the matter in hand. As already stated, the proceedings were not contentious proceedings at the time when probate was granted by the the Prothonotary & Senior Master. The attention is also sought to be drawn to the decision in the matter of **Sunil Kumar Bhattacharjee**, reported in 1997 Calcutta Law Times (1) 440. The said decision also has no application to the matter in hand. That was a case where the applicant therein had claimed that he be given an opportunity to contest in the probate proceedings and time was sought to file written objections. Accordingly the time was granted, however, ignoring the same, the probate was granted. That is not the case in the matter in hand and hence, the said decision is also of no help to seek interference in the impugned order.

6. For the reasons stated above, there is no case for interference. The appeal is, therefore, dismissed. No order as to costs.

(R. M. S.KHANDEPARKAR, J.)

(DR.D. Y. CHANDRACHUD, J.)